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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ATHHANE SAVANGSENGOUTH,

Defendant and Appellant.

D052290

(Super. Ct. No. SCN233922)

APPEAL from a judgment of the Superior Court of San Diego County, Joel M. Pressman, Judge. Affirmed.

I.

INTRODUCTION

Appellant Athhane Savangsengoutha appeals from a judgment of conviction and sentence imposed after jury trial. Savangsengoutha was convicted after an incident in which he unlawfully entered a restaurant in Solana Beach and took tools and approximately \$2,200 in cash. The owners of the restaurant arrived at the location before

Savangsengoutha escaped from the locked restaurant through a window, and followed him as he fled on foot. During the pursuit, Savangsengoutha raised a drill in the direction of one of the men and then ran off. A short time later, Savangsengoutha turned around with a folding knife in his hand and threatened to cut the man. Soon thereafter, police officers arrived and arrested Savangsengoutha.

The jury convicted Savangsengoutha of one count of robbery, one count of commercial burglary, and one count of grand theft. Although the information also alleged that Savangsengoutha personally used a deadly weapon—a knife—in the commission of the crimes, the jury made no findings with regard to the enhancement allegations. The trial court sentenced Savangsengoutha to eight years in state prison.

On appeal, Savangsengoutha contends that the trial court erred in responding to a note from the jury inquiring whether the jury could find Savangsengoutha guilty of robbery if it did not find true the allegation that he personally used a deadly weapon. According to Savangsengoutha, the trial court should have answered the question in the negative, because the prosecutor had elected to proceed on the theory that Savangsengoutha's pulling out the knife was the means by which he employed force or fear to take and retain the restaurant owners' property. Savangsengoutha argues that if the jury rejected the allegation that he personally used the knife during the commission of the crime, then it could not have found that he used force or fear, which is an essential element of robbery, in taking the restaurant owners' money. Savangsengoutha argues in the alternative that if the trial court did not err in instructing the jury that it could convict him of robbery even if it could not reach agreement as to the enhancement allegation, the

court should have given a unanimity instruction because some jurors might have convicted him based on his conduct in raising the drill in a threatening manner, while others might have convicted him based on his use of the knife.

Savangsengoutha also argues that the trial court abused its discretion in sentencing him to the upper terms for the offenses, as well as in imposing consecutive, as opposed to concurrent, sentences. He complains that the trial court "[a]pparently . . . used all the same aggravating factors to both impose upper terms and to impose consecutive sentences."

We conclude that the trial court did not err in responding to the jury's question, and was not required to give a unanimity instruction. We further conclude that the trial court did not abuse its discretion in sentencing Savangsengoutha to the upper terms for the offenses, or in imposing consecutive sentences. We therefore affirm the judgment.

## II.

### FACTUAL AND PROCEDURAL BACKGROUND

#### A. *Factual background*

##### 1. *The prosecution's case*

At approximately 5:30 a.m. on August 28, 2007, Rolf Moeller, a bread delivery man, arrived at Chief's Burgers & Brew in Solana Beach to make a delivery. Moeller used his key to open a door to the restaurant and began moving bread inside. During this process, Moeller saw Savangsengoutha standing about two feet inside the building. Savangsengoutha was wearing an apron and had a backpack. Moeller asked Savangsengoutha what he was doing there, and Savangsengoutha said that he was there

to wash trays. Moeller asked Savangsengoutha to leave, but instead of leaving, Savangsengoutha walked to the back of the restaurant. Moeller locked Savangsengoutha inside the restaurant and called his boss to tell him about the situation and to ask him to call the owners of the restaurant.

Joseph Sillstrop and his son, Sean Sillstrop, own Chief's Burgers & Brew. At approximately 6:00 a.m. on August 28, Sean received a telephone call about a suspicious person inside the restaurant. Sean called Joseph to inform him of the situation. Joseph asked his wife to call 911 to report the incident before he left to go to the restaurant. When Joseph arrived at the restaurant, he saw that a light was on in the kitchen. Joseph watched the restaurant as he waited in his truck. Sean arrived a short time later. Joseph motioned for Sean to stay in his car, as well. Joseph and Sean saw Savangsengoutha crawl out of one of the restaurant's windows and onto a patio. Savangsengoutha then climbed over a wall that separated the patio from a parking lot and began walking up the street. Savangsengoutha had a backpack in his possession.

Joseph followed Savangsengoutha in his truck. Sean also started following Savangsengoutha. Joseph eventually pulled his truck up near the curb by Savangsengoutha, got out of the truck, and said, "Hey, you have our shit, and you're not going anywhere." Savangsengoutha raised a drill he had taken from the restaurant in Joseph's direction, and Joseph stepped back. Savangsengoutha dropped the drill and continued walking. Joseph followed him. Savangsengoutha walked approximately 30 yards down the street and then turned around toward Joseph. Savangsengoutha pulled out a knife out and said, "I have a knife. I'm going to cut you." Joseph was

approximately five feet away from Savangsengoutha at this point. Joseph testified that he saw the blade of the knife, and said that Savangsengoutha thrust the knife toward Joseph. Joseph backed away to "tr[y] to make sure [he] was out of the range of getting hurt." Joseph said to Savangsengoutha, "Well, you're going to have to do what you're going to have to do, but you're not going anywhere."

Savangsengoutha took off running with the backpack on his back. Joseph ran slowly after Savangsengoutha, and saw Savangsengoutha drop the backpack on the ground. Shortly thereafter, a sheriff's deputy arrived on the scene and took Savangsengoutha into custody. Deputy Sheriff Anthony Chatman searched Savangsengoutha and found a closed folding knife, approximately \$780 in cash, and some tools and keys in Savangsengoutha's possession. The deputy also found approximately \$1,500 in cash in the backpack that Savangsengoutha dropped.

## *2. The defense case*

Savangsengoutha admitted that he had gone into the restaurant and that he had taken the property and money he was accused of having taken. He said that he did not notice anyone following him after he left the restaurant. While he was walking in the neighborhood, a man driving a car made a U-turn, parked in the middle of the street, jumped out of the car, and started screaming at Savangsengoutha. Savangsengoutha said that he did not know who Joseph and Sean Sillstrop were when they confronted him. He held up a closed knife and told the men to back off. Savangsengoutha said that he was trying to defend himself because he was afraid the men were trying to attack or kidnap him.

B. *Procedural background*

Savangsengoutha was charged by information with one count of robbery (Pen. Code<sup>1</sup>, § 211 (count 1)), one count of commercial burglary (§ 459 (count 2)), and one count of grand theft (§ 487, subd. (a) (count 3)). The information alleged that Savangsengoutha personally used a deadly weapon—a knife—during the commission of all three crimes (§ 12022, subd. (b)(1) and § 1192.7, subd. (c)(23). It was further alleged that Savangsengoutha had previously suffered three prison priors (§§ 667.5, subd. (b), 668).

A jury convicted Savangsengoutha on all counts on November 13, 2007. The jury made no findings with regard to the allegations of personal use of a knife.

Savangsengoutha admitted the truth of the three prison prior allegations.

On January 2, 2008, the trial court sentenced Savangsengoutha to state prison for a term of eight years. The sentence consisted of the upper term of five years on count 1, one-third the upper terms on counts 2 and 3 (terms the court stayed pursuant to section 654), and an additional three years, one for each of the three prison priors, consecutive to the sentence on count 1 and to each other.

Savangsengoutha filed a notice of appeal on January 4, 2008.

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<sup>1</sup> Further statutory references are to the Penal Code unless otherwise indicated.

### III.

#### DISCUSSION

- A. *The trial court did not err in instructing the jury that it could convict Savangsengoutha of robbery even if jurors could not agree as to the deadly weapon enhancement allegation*

Savangsengoutha contends that the trial court erred in responding to the jury's inquiry as to whether the jury could find him guilty of robbery without finding true the allegation that he personally used a deadly weapon. According to Savangsengoutha, the prosecutor relied solely on the theory that Savangsengoutha's use of the knife constituted the means by which he "used force or fear sufficient to elevate what would have otherwise been a non-violent theft offense to a robbery." Savangsengoutha argues that the trial court should have instructed the jury that if it did not find that he used the knife for purposes of the deadly weapon allegation, then it could not find that he had used "force or fear" in taking the Sillstrops' property. He argues in the alternative, that by permitting the jury to find him guilty of robbery without finding that he used a deadly weapon, the trial court deprived him of a unanimous determination as to how he created the force or fear necessary to establish the crime of robbery.

1. *Additional background*

During deliberations, the jury sent the court a note asking, "[W]hat do we do when we cannot agree on the allegation?" The parties and the court agreed on the following response, which the court used to further instruct the jury:

"1. Is there any further instructions [sic] on the law that would be of assistance?"

"2. Continue deliberating unless further deliberations would be useless.

"3. Then if you all can not [sic] agree upon the allegation, then leave that finding blank."

The jury sent the court a second note that stated, "Yes. Can we find the defendant guilty of robbery and not the allegation?" The trial court asked the attorneys for their input as to on how the court should respond to this question. Defense counsel argued that under the facts of this case as presented by the prosecution, the court should instruct the jury that it could not find Savangsengoutha guilty of robbery if it did not find true the allegation that Savangsengoutha personally used a knife. The prosecutor contended that the correct answer was "yes." The court determined that it would respond to the jury's question by stating, "Yes. Please see jury instruction [number] 3515." The court noted that CALCRIM No. 3515 had been modified, and that the court had previously instructed the jury as follows:

"Each of the counts charged in this case is a separate crime. You must consider each count separately and return a separate verdict for each one.

"The allegations, i.e., personal use of a weapon, are separate decisions from each count and require a separate finding for each allegation."

2. *Analysis*

a. *The trial court correctly instructed the jury in response to the jury's question*

Contrary to Savangsengoutha's contention, the trial court was correct in telling the jury that it could convict Savangsengoutha of robbery even if jurors could not agree as to



whether Savangsengoutha had personally used the knife as a deadly weapon. The court instructed the jury that the elements of robbery are: (1) the defendant took property that was not his own; (2) the property was taken from another person's possession and immediate presence; (3) the property was taken against the other person's will; (4) the defendant used force or fear to take the property or to prevent the person from resisting; and (5) the defendant intended to deprive the owner of the property permanently when the defendant used force or fear to take the property. The court further instructed the jury that "fear" as used in the robbery instruction meant "fear of injury to the person himself, or injury to the person's family or property, or immediate injury to someone else present during the incident or to that person's property."

As to the enhancement allegation of personal use of a deadly weapon, the trial court instructed the jury pursuant to CALCRIM No. 3145, as follows: "A deadly or dangerous weapon is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury." (Italics omitted.) The court defined "great bodily injury" as "significant or substantial physical injury," which is an "injury that is greater than minor or moderate harm." It is clear from these instructions that the jury was aware that it is possible for a person to use force or fear in committing a robbery without necessarily personally using a deadly weapon in the process.

Savangsengoutha asserts that this theoretical possibility is not true in this case because the prosecutor argued that it was Savangsengoutha's use of the knife that constituted the use of "force or fear sufficient to elevate . . . a non-violent theft offense to

a robbery." According to Savangsengoutha, the prosecutor elected to argue that it was Savangsengoutha's act of "pulling out the knife and threatening to cut [Mr. Sillstrop,]" and not Savangsengoutha's act in brandishing the drill, that was the conduct that constituted the use of force or fear, making Savangsengoutha's taking of the money a robbery. Savangsengoutha goes on to argue that if the jury could not agree that he used the knife, which he contends is evidenced by the jury's inability to agree on the deadly weapon enhancement, then the jury necessarily would not be able to agree on the prosecution's only theory of the robbery—i.e., that Savangsengoutha used the knife as his means of using force or fear to take the stolen property.

Savangsengoutha's argument is based on at least two problematic presumptions. First, it is not clear from the record that the prosecution relied solely on Savangsengoutha's use of a knife to prove that he employed the force or fear necessary to establish that a robbery was committed. For example, during closing arguments, the prosecutor told the jury that in order to convict Savangsengoutha of robbery, it had to determine that he "used either fear or force." The prosecutor went on to explain, "And the interesting thing about robbery is sometimes people can just intimidate you with their voice, and they can cause fear." The prosecutor then discussed the fact that Savangsengoutha had threatened Joseph Sillstrop by saying, "I'll cut you." Thus, the prosecutor argued to the jury that although she believed she had proven beyond a reasonable doubt that Savangsengoutha had displayed and used the knife to create fear and/or as a use of force against the victim, he could be convicted of robbery even if he used only his voice to cause the victim to be fearful.

Second, it is not necessarily true that the lack of a true finding with regard to the enhancement for personal use of a deadly weapon means that the jury must not have agreed that Savangsengoutha had "used"-i.e., displayed, the knife at all. Knives are typically considered to be inherently dangerous weapons. Thus, under most circumstances, a jury's rejection of a deadly weapon enhancement predicated on the use of a knife would suggest that the jury did not believe that the defendant used the knife in any way during the commission of the crime. The peculiar circumstances of this case, however, leave open another possibility. The knife in question was a folding knife. The prosecution attempted to establish that Savangsengoutha displayed the folding knife in the open position. Savangsengoutha testified, however, that while he displayed his folding knife to Joseph Sillstrop as a means of self-defense, he displayed the knife in a closed position. A folding knife in the closed position is not necessarily an inherently deadly weapon, at least not any more so than would be any other object of similar size and weight.

In these circumstances, the jury could have been unable to unanimously agree as to whether the folding knife was open or closed. This would have led to the lack of a true finding on the deadly weapon enhancement allegation. However, the jurors could have unanimously agreed that Savangsengoutha displayed the folding knife (in either an open or closed position), and that in doing so, he used force or fear to take the Sillstrops' property. This would have resulted in a unanimous conviction on the robbery charge. The trial court was therefore correct in informing the jury that it could convict

Savangsengoutha of robbery even if the jurors were not able to reach a unanimous finding on the deadly weapon enhancement allegation.

b. *No unanimity instruction was required*

Savangsengoutha asserts that the trial court denied him a unanimous verdict by failing to instruct the jurors that they had to agree as to which of his acts met the use of "force or fear" element of robbery. He contends that some jurors might have believed that he used force or fear by threatening Joseph with the drill, while others might have thought that he used force or fear by threatening Joseph with the knife.

If only one offense is charged, but the evidence shows multiple discrete acts, each of which could constitute a separate offense, a unanimity instruction is required. (*People v. Riel* (2000) 22 Cal.4th 1153, 1199.) However, a unanimity instruction is not required when the acts in question are so closely connected as to form part of one and the same transaction. (*People v. Mota* (1981) 115 Cal.App.3d 227, 231-233.) In addition, "unanimity as to exactly how the crime was committed is not required." (*People v. Russo* (2001) 25 Cal.4th 1124, 1135.) "Thus, the unanimity instruction is appropriate 'when conviction on a single count could be based on two or more discrete criminal events,' but not 'where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event.' [Citation.]" (*Ibid.*) "In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single

discrete crime. In the first situation, but not the second, it should give the unanimity instruction." (*Ibid.*)

Although the jury had to find that Savangsengoutha in some way used force or fear in order to convict him of robbery, the question whether he brandished the drill or the knife goes only to how the crime was committed. There were not two separate takings that could form the basis of the robbery. Rather, there was a single unlawful taking, and the retention of property undertaken with the use of force or fear. Thus, even if the jurors disagreed as to which act on Savangsengoutha's part constituted the use of force or fear, as long as they all agreed that he used some type of force or fear to take and/or retain the property, the jury unanimously found Savangsengoutha guilty of a single robbery. In other words, there is no danger that some jurors would believe that Savangsengoutha was guilty of one robbery, while others would believe that he was guilty of a different robbery.

The evidence also demonstrated that Savangsengoutha's actions were part of a continuous course of conduct, and were so closely connected that they were parts of the same transaction. The multiple acts of force or fear that Savangsengoutha contends constitute separate criminal "acts" were simply parts of an ongoing process during which Savangsengoutha was attempting to prevent Joseph Sillstrop from resisting the taking of his property. The acts did not represent discrete criminal events. Savangsengoutha's conduct thus falls within the continuous course of conduct exception to the requirement of a unanimity instruction, as well. (*People v. Jenkins* (1994) 29 Cal.App.4th 287, 299.)

Therefore, contrary to Savangsengoutha's contention, the trial court had no duty to give a unanimity instruction.

B. *The trial court did not abuse its discretion in imposing the upper term and consecutive sentences*

Savangsengoutha raises two arguments with regard to the sentence the trial court imposed. He first contends that the trial court improperly imposed an upper term sentence. Specifically, Savangsengoutha maintains that in imposing the upper term, the trial court relied on the same facts that served as the basis for the enhancements. Second, he contends that the trial court abused its discretion in imposing consecutive rather than concurrent sentences on counts two and three,<sup>2</sup> for the same reason. Savangsengoutha essentially argues that the trial court "used all the same aggravating factors to both impose upper terms and to impose consecutive sentences." He maintains that even though "only one valid factor is required to uphold an upper term sentence and only one is required to uphold a consecutive sentence," because "the trial court listed several factors together" rather than detailing which factor(s) supported each sentencing choice, "there is no way to determine which factors were considered to be more important and thus the listing of all the factors together for both enhancements was improper." Savangsengoutha also suggests that because his "criminal past" had already been used as the basis for enhancing his sentence by three years—one for each of the prior prison

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<sup>2</sup> The trial court stayed the imposition of sentence on counts two and three pursuant to section 654.

enhancements—the further use of his "criminal past" constituted "an improper dual use of facts to impose multiple punishment."

As an initial matter, the People contend that Savangsengoutha forfeited this argument by failing to raise it in the trial court. The rule announced in *People v. Scott* (1994) 9 Cal.4th 331, 353, generally precludes appellate review of this type of challenge where the defendant failed to raise the issue in the trial court, because in such a situation the trial court did not have the opportunity to correct the claimed error. However, Savangsengoutha contends that his attorney's failure to object at sentencing constitutes ineffective assistance of counsel. We therefore address Savangsengoutha's argument on the merits, and conclude that he is not entitled to the relief he seeks.

In considering the various factors related to Savangsengoutha's sentence, the trial court stated,

"The defendant has admitted to the three prior felony convictions and that's significant. What also is significant is the fact that the allegations that were alleged in each defense [*sic*] of 12022(b) were not found proven by the jury; however, in my analysis of the aggravating circumstances relative to the mitigating circumstances, it's clear to this court that this particular defendant has demonstrated a criminal activity past and consciousness that doesn't seem to be modified by any of the behaviors that--that this system has imposed on him in the past.

"The--defendant's conduct and performance on probation according to his parole agent is that he was a miserable failure, resistant to supervision and he was resist--was--he's very resistant to supervision. He's a hard-core guy and he's a danger to the community. I need to consider that as well as the activities in this case.

"In this case it's clear to--to me that in my 4.421 analysis a weapon was used at one point. A knife, as well as a threat to cut with the knife and the drill. It's clear that the crime was committed with a certain degree of professionalism and planning.

"Further, it's clear that he stole significant sums of money and there isn't any reason why[,] that this court sees[,] that this defendant should be given any consideration in terms of mitigating circumstances and that the aggravating circumstances outweigh any restraint by the defendant or his story."

The court also stated that it had read and considered the probation report, as well as Savangseoutha's statement in mitigation.

Savangseoutha concedes that the standard of review applicable to his sentencing challenges is the abuse of discretion standard. (See *People v. Birmingham* (1990) 217 Cal.App.3d 180 [decision to impose consecutive sentences reviewed for abuse of discretion]; *People v. Rivera* (1993) 14 Cal.App.4th 1743 [decision to impose upper term reviewed for abuse of discretion].) "'Sentencing courts have wide discretion in weighing aggravating and mitigating factors [citations], and may balance them against each other in qualitative as well as quantitative terms.' [Citation]." (*People v. Lamb* (1988) 206 Cal.App.3d 397.)

Savangseoutha argues that by relying heavily on his criminal history, the trial court improperly used the same "fact" that already had been used to enhance his sentence through the three prison prior allegations. "[T]wo express 'dual use' prohibitions appear in the Determinate Sentencing Act. Section 1170, subdivision (b), prohibits imposition of an upper term based upon 'the fact of any enhancement upon which sentence is imposed . . . .' California Rules of Court, rule 425(b), states that a fact that is an element



of the crime, or that is used to impose an upper term or otherwise enhance a defendant's prison sentence, may not be used also to justify imposition of a consecutive rather than a concurrent sentence." (*People v. Jenkins* (1995) 10 Cal.4th 234, 252, fn. 10) Thus, the trial court could not properly impose an upper term sentence based on the fact that Savangsengoutha suffered a prison prior for which a one-year enhancement had already been imposed. However, the fact that Savangsengoutha suffered any single prior prison conviction is not the same as the circumstance the court appeared to have considered, which is the fact that Savangsengoutha has suffered multiple prior convictions and appears to be a habitual offender. (See *People v. Hurley* (1983) 144 Cal.App.3d 706, 713 [approving of use of "numerous prior convictions which include conviction(s) underlying the enhancement prior(s)" while also enhancing for prior prison terms, since "[d]ifferent qualitative factors are involved"].) We are therefore unconvinced that the trial court made dual use of Savangsengoutha's prison priors.

Even if we presume that some of the facts on which the trial court relied in imposing the upper term and consecutive sentences had already been used to enhance his sentence, the court identified a number of additional circumstances that would be sufficient, on their own, to support an upper term or consecutive sentencing. "[A] court needs only one factor to impose the aggravated term. [Citation.]" (*People v. Kelley* (1997) 52 Cal.App.4th 568, 581.) Similarly, a court needs only one factor to impose consecutive sentences for remaining counts. (*People v. Davis* (1995) 10 Cal.4th 463, 552.) In addition to Savangsengoutha's criminal history, the court noted that Savangsengoutha performed poorly while on probation, that he used a knife during the

commission of the crimes, and that the crimes involved professionalism and planning. Any one of these circumstances could justify the trial court's decision to impose the upper term, and any one of the remaining circumstances could justify the court's decision to impose consecutive sentences. It is reasonable to infer that the court relied on at least one of the three articulated factors to support the upper term, and at least one other factor to support the imposition of consecutive sentences.

Savangsengoutha suggests that two of the aggravating factors on which the court relied were "unfairly used." He contends that the court should not have considered the fact that he "stole large amounts of money" because all of the money was eventually returned to its rightful owners, and because Savangsengoutha "relinquished" a good portion of the money when he discarded his backpack. He also contends that the trial court should not have considered Savangsengoutha's use of a weapon to be an aggravating circumstance because "the jury refused to find the weapon use allegation to be true." These contentions are without merit. The fact that Savangsengoutha ultimately dropped the backpack containing some of the money he stole, or that the money was recovered and returned to its owners, does not negate the fact that Savangsengoutha intentionally took a large sum of money that did not belong to him. In addition, for the reasons discussed in section III.A.2., *ante*, the lack of jury finding that Savangsengoutha personally used a deadly weapon does not mean that the jury rejected the evidence that Savangsengoutha possessed and used a weapon. In fact, Savangsengoutha admitted that he pulled the folding knife on Joseph Sillstrop, but claimed that he did so in self-defense. It was thus proper for the court to consider these factors in imposing sentence.

It is clear from Savangsengoutha's brief that he is requesting that this court independently weigh the aggravating and mitigating circumstances. He contends that "on balance the mitigating circumstances outweighed the aggravating circumstances and consequently [the] lower term or at the very least mid term concurrent sentences should have been imposed." Savangsengoutha contends that his situation differs from that of the defendant in *People v. Hurley* (1983) 144 Cal.App.3d 706, "because in *Hurley* there was only one mitigating circumstance that was far outweighed by the many aggravating circumstances and thus an aggravated sentence was properly imposed." Reciting the mitigating circumstances that his attorney offered to the court, Savangsengoutha maintains that this case involves "far more mitigating circumstances than aggravating ones." However, the trial court considered all of those circumstances and concluded that the aggravating circumstances outweighed any mitigating circumstances. The trial court clearly did not believe that the low or middle term and/or concurrent sentences were appropriate in this situation. Given the fact that the trial court identified a number of aggravating circumstances to support its sentencing decisions, we conclude that the court did not abuse its discretion in choosing to impose both the upper term and consecutive sentences. It is not our role to reweigh the mitigating and aggravating factors to reach a result different from the result reached by the trial court.

IV.  
DISPOSITION

The judgment is affirmed.

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AARON, J.

WE CONCUR:

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HUFFMAN, Acting P. J.

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O'ROURKE, J.